

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
	<b>Respondent,</b>	)
	)	
<b>vs.</b>	)	<b>No. SC85620</b>
	)	
<b>JEFFREY D. LONG,</b>	)	
	)	
	<b>Appellant.</b>	)

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI  
SEVENTH JUDICIAL CIRCUIT  
THE HONORABLE MICHAEL J. MALONEY, JUDGE**

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**APPELLANT’S SUBSTITUTE BRIEF**

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## INDEX

TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS.....	6
POINTS RELIED ON.....	
I. Denial of relevant evidence – false accusations by Ms. Flower .....	20
II. Insufficient evidence .....	21
III. Testimonial State’s exhibit viewed by jury during deliberation .....	23
IV. Ms. Flower’s mental health records.....	24
V. Denial of relevant evidence – Ms. Flower’s actions after drinking .....	26
VI. Denial of relevant evidence – bizarre rape allegation.....	27
ARGUMENT.....	
I. Denial of relevant evidence – false accusations by Ms. Flower .....	28
II. Insufficient evidence .....	40
III. Testimonial State’s exhibit viewed by jury during deliberation .....	46
IV. Ms. Flower’s mental health records.....	54
V. Denial of relevant evidence – Ms. Flower’s actions after drinking .....	63
VI. Denial of relevant evidence – bizarre rape allegation.....	69
CONCLUSION.....	74
CERTIFICATE OF COMPLIANCE AND SERVICE.....	75
APPENDIX .....	A-1 to A-11

## **TABLE OF AUTHORITIES**

### **CASES:**

<i>Brandt v. Medical Defense Associates</i> , 856 S.W.2d 667 (Mo. banc 1993) .....	25, 61
<i>Brown v. Commonwealth</i> , 510 S.E.2d 751 (Va. App. 1999) .....	36
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973) .....	66
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986) .....	33, 65, 71
<i>Davis v. Alaska</i> , 415 U.S. 208 (1974) .....	25, 58, 66
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	21, 41
<i>Kentucky v. Stincer</i> , 482 U.S. 730 (1987) .....	57
<i>Olden v. Kentucky</i> , 488 U.S. 227 (1990) .....	26, 33, 65, 66, 71
<i>O’Neal v. Pipes Enterprises, Inc.</i> , 930 S.W.2d 416 (Mo.App.W.D. 1995) .....	23, 48-51
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39 (1987) .....	57
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965) .....	57
<i>Royals v. State</i> , 65 S.E.2d 158 (Ga. 1951) .....	50
<i>State ex rel. Dixon Oaks Health Center, Inc. v. Long</i> , 929 S.W.2d 226 (Mo. App. S.D. 1996) .....	58
<i>State v. Barnett</i> , 980 S.W.2d 297 (Mo. banc 1998) .....	48
<i>State v. Barriner</i> , 111 S.W.3d 396 (Mo. banc 2003) .....	39, 73
<i>State v. Bowlin</i> , 850 S.W.2d 116 (Mo. App. S.D. 1993) .....	39, 67, 72
<i>State v. Brooks</i> , 675 S.W.2d. 53 (Mo. App. S.D. 1984) .....	23, 48, 49
<i>State v. Brown</i> , 549 S.W.2d 336 (Mo. banc 1977) .....	34, 66, 72
<i>State v. Carter</i> , 641 S.W.2d 54 (Mo. banc 1982) .....	57

<i>State v. Cole</i> , 867 S.W.2d 685 (Mo. App. E.D. 1993).....	47
<i>State v. Dawson</i> , 985 S.W.2d 941 (Mo. App. W.D. 1999) .....	21, 41
<i>State v. Douglas</i> , 797 S.W.2d 532 (Mo. App. W.D. 1990).....	26, 66
<i>State v. Evans</i> , 639 S.W.2d 792 (Mo. banc 1982).....	23, 48, 49
<i>State v. Evans</i> , 802 S.W.2d 507 (Mo. banc 1991).....	61
<i>State v. Grim</i> , 854 S.W.2d 403 (Mo.banc 1993) .....	41, 42
<i>State v. Hedrick</i> , 797 S.W.2d 823 (Mo. App. W.D. 1990) .....	34
<i>State v. Hill</i> , 817 S.W.2d 584 (Mo. App. E.D. 1991) .....	27, 33, 65, 71
<i>State v. Jennings</i> , 815 S.W.2d 434 (Mo. App. E.D. 1991) .....	49
<i>State v. Keeler</i> , 856 S.W.2d 928 (Mo. App. S.D. 1993) .....	21, 41
<i>State v. Lampley</i> , 859 S.W.2d 909 (Mo. App. E.D. 1993).....	20, 29, 32, 34, 35
<i>State v. Long</i> , No. WD61050, slip op., (Mo. App. W.D. 2003) .....	32, 33, 44, 50
<i>State v. Montgomery</i> , 901 S.W.2d 255 (Mo. App. E.D. 1995).....	20, 29, 32, 35
<i>State v. Moorehead</i> , 811 S.W.2d 425 (Mo. App. E.D. 1991).....	57, 58
<i>State v. Newton</i> , 963 S.W.2d 295 (Mo. App. E.D. 1997).....	57
<i>State v. Pierson</i> , 85 S.W.2d 48, 54-55 (Mo. 1935).....	34
<i>State v. Poe</i> , 458 S.E.2d 242 (N.C. App. 1995) .....	23, 52
<i>State v. Ray</i> , 945 S.W.2d 462 (Mo. App. W.D. 1997).....	26, 27, 33, 34, 65, 71
<i>State v. Richardson</i> , 838 S.W.2d 122 (Mo. App. E.D. 1992).....	27, 34, 65, 71
<i>State v. Robinson</i> , 835 S.W.2d 303 (Mo. banc 1992).....	38, 58
<i>State v. Scott</i> , 78 S.W.3d 806 (Mo. App. S.D. 2002).....	20, 26, 27, 36, 72
<i>State v. Sipes</i> , 651 S.W.2d 659 (Mo. App. S.D. 1983).....	45

<i>State v. Whalen</i> , 49 S.W.3d 181 (Mo. banc 2001) .....	21, 42, 44
<i>State v. Williams</i> , 492 S.W.2d 1 (Mo. App. E.D. 1973).....	20, 29, 33, 37, 38
<i>State v. Wolfe</i> , 13 S.W.3d 248 (Mo. banc 2000) .....	37, 38
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	33, 65, 71
<i>Thomason v. Genuine Parts Co.</i> , 275 S.E.2d 159 (Ga. App. 1980) .....	53
<i>United States v. Lindstrom</i> , 698 F.2d 1154 (11th Cir. 1983).....	25, 59, 60
<i>United States v. Society of Independent Gasoline Marketers of America</i> , 624 F.2d 461 (4th Cir. 1979).....	25, 59, 60

#### **CONSTITUTIONAL PROVISIONS:**

U.S. Const., Amend VI .....	20, 23-28, 33, 39, 46, 54, 63, 65, 67, 68, 69, 71
U.S. Const., Amend XIV .....	20, 21-28, 33, 39, 40, 41, 46, 54, 63, 65, 68, 69, 71
Missouri Constitution, Article I, Section 10 .....	21, 22, 23, 25, 40, 41, 46, 54
Missouri Constitution, Article I, Section 18(a).....	23, 25, 46, 54

#### **STATUTES:**

Section 491.015, RSMo 2000 .....	20, 26, 27, 36, 66, 72
Section 491.060, RSMo 2000 .....	25, 57
Section 566.010(4), RSMo 2000 .....	22, 43
Section 566.030, RSMo 2000 .....	21, 22, 40, 43

## **JURISDICTIONAL STATEMENT**

Appellant, Jeffrey D. Long, appeals his convictions for forcible rape, Section 566.030 (Count I) and forcible sodomy (Counts II), Section 566.060, RSMo 2000.<sup>1</sup> Mr. Long was sentenced as a prior and persistent offender to consecutive sentences of twenty years imprisonment on each count. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const. (as amended 1982); Section 477.070. This Court thereafter granted the Mr. Long's application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

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<sup>1</sup> All statutory references are to RSMo 2000, unless otherwise indicated.

## **STATEMENT OF FACTS**

### ***I. The state's evidence***

Debbie Flower received disability, had a caseworker at “Tri-County,” and was on the following medications: Serzone, Neurontin, Klonopin, Trazedone and Pemarkin (a hormone) (Tr. 143-44, 306).<sup>2</sup> In April of 2001 she lived in the Lakeview Terrace Mobile Home Park (Tr. 144, 258). Chris Manning and his girlfriend, Kristen Todtenhausen, also lived in that trailer park (Tr. 146).

On April 21, 2001, Ms. Flower saw Mr. Manning at the grocery store (Tr. 147-48, 172, 259-60). Mr. Manning loaned her some money and invited Ms. Flower to a party (Tr. 148, 172-73, 260-61). He said that some of her acquaintances were going to be at the party, so she agreed to go (Tr. 148-49, 183, 238-39, 279-80).<sup>3</sup> Mr. Long was with Mr. Manning (Tr. 172).<sup>4</sup>

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<sup>2</sup> The Record on Appeal consists of 2 volumes of transcript (Tr.) and a legal file (L.F.).

<sup>3</sup> She testified that often she would watch television with those acquaintances to (Tr. 183-85, 280). At trial, some of those acquaintances denied that they had watched television with Ms. Flower (Tr. 372, 374-76, 404).

<sup>4</sup> Initially, Ms. Flower could not identify Mr. Long in court, though she later did after a break in her testimony (Tr. 158, 170-71, 212). She also had identified Mr. Long in a photographic lineup (Tr. 275).

After Ms. Flower returned to her trailer, she later met up with Mr. Manning (Tr. 150, 173). It was still day light (Tr. 181). Mr. Long was in a truck with Mr. Manning (Tr. 151, 273). Ms. Flower got into the truck and they went to Mr. Long's apartment, stopping first to buy some alcohol (Tr. 150, 176-78). Ms. Flower said that she could not "tolerate" any kind of alcohol because it made her sick, but vodka would be the best for her (Tr. 150-51, 175-76, 178). She would only drink vodka, and would only drink it about once every six months (Tr. 177-78).

When they got to Mr. Long's apartment, Mr. Long and Manning smoked some crack cocaine (Tr. 152). All three of them drank the vodka (Tr. 154-55, 178-79, 180). Ms. Flower told them that she could only drink a little of it because she was on medication (Tr. 155). However, she believed that they kept adding vodka to her glass as she was drinking it (Tr. 179). When she noticed that was happening, she stopped drinking because she knew how her medication would affect her (Tr. 179).

Mr. Long also showed a pornographic video (Tr. 153).<sup>5</sup> When Ms. Flower attempted to leave, Mr. Long grabbed her and pulled her back into his apartment (Tr. 153, 156-57, 192). Mr. Manning grabbed her also (Tr. 153). During the

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<sup>5</sup> She told the police that it was "kiddie porn," and testified that it was "all rectum" sex, including little boys having sex (Tr. 181, 284). At trial, she testified that it was adult women having sex with adult men (Tr. 181).



struggle, she scratched Mr. Long's neck and face (Tr. 185, 186, 281-82). She also scratched Mr. Manning's face (Tr. 185-86). She was clawing with both hands, and possibly hurt both Mr. Long and Mr. Manning (Tr. 185). She noticed blood on her fingertips (Tr. 186).

Mr. Long took off her shorts and panties, but not her T-shirt or tank top (Tr. 153, 157, 209). While Mr. Manning held Ms. Flower's legs, Mr. Long stuck his penis in Ms. Flower's anus (Tr. 153, 158-59). He did this twice (Tr. 186).<sup>6</sup> He ejaculated the first time; she was not sure if he did so the second time (Tr. 187, 285). Mr. Manning stuck his penis in Ms. Flower's anus and in her mouth (Tr. 161, 162, 186, 188, 282). Ms. Flower testified that because she was in so much pain after Mr. Long sodomized her, she could not tell whether Mr. Manning "dejaculated" (sic) (Tr. 161, 188).<sup>7</sup> She did not feel either man put their penises in her vagina, so she did not think they did (Tr. 190-91).

Mr. Long also stuck his penis in Ms. Flower's mouth, ejaculated some in her mouth; she spit it out and bit his penis as hard as she could, causing her false teeth to fall out (Tr. 160, 187-88, 189-90, 194-95, 284). Mr. Long back-handed her in the face real hard and knocked her unconscious (Tr. 160, 188, 189, 194-95, 281). Ms. Flower kept slipping "in and out of consciousness", but she

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<sup>6</sup> She told an officer that it happened three times (Tr. 284).

<sup>7</sup> She told an officer that Mr. Long ejaculated in her mouth, but Mr. Manning did not ejaculate in her mouth (Tr. 282, 285).

remembered that Mr. Long and Mr. Manning had “sex” with each other several times (Tr. 161, 188-89).

After they were done sexually assaulting her, they picked her up while she was naked from the waist down, and threw her into the hallway outside of the apartment (Tr. 162-63, 195-97).<sup>8</sup> They threw the rest of her clothes out with her, except for her shoes (Tr. 163). She was in the hallway all night (Tr. 197-98).

At some point the next morning, Ms. Flower asked a woman to help her, but the woman said that she did not want to be involved (Tr. 163, 197-98, 202). Ms. Flower put on her clothes and walked a few blocks to Sunfresh Store and had a security man call a taxi for her (Tr. 163-64, 200, 204-05).<sup>9</sup> She told him that her boyfriend had left her, she did not mention that she had been sexually assaulted (Tr. 164, 205).

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<sup>8</sup> She did not know how long she was in the apartment, but noted that it was dark outside afterwards (Tr. 182-83). A nurse testified that Ms. Flowers gave the time of the assault as being from about “four o’clock” on April 20<sup>th</sup> until about five o’clock in the morning on April 21<sup>st</sup> (Tr. 222, 235-37).

<sup>9</sup> She did not tell an officer that she slept in the hallway of the apartment; she told the officer that after they kicked her out of the apartment she got dressed and walked to Sunfresh (Tr. 285-86).

The following Monday, April 23<sup>rd</sup>, Ms. Flower told a friend what had happened (Tr. 164-65, 205-06, 261-62). As a result, Ms. Flower was persuaded to go to a hospital that day (Tr. 165, 219-20, 262-63).

While at the hospital, a nurse took some hair and other forensic samples (Tr. 165, 218, 219-21, 227-28). Ms. Flower told the nurse that she had been grabbed by her right arm, slung down to the ground, and was held by the back of her legs (Tr. 227). She also said that she was hit in the jaw and her left eye, and that the right side of her head hit the wall (Tr. 227). She mentioned that she had passed out (Tr. 227). When she was fading in and out, she saw them “doing each other,” and later woke up in the hallway with her shorts and underwear beside her (Tr. 237). She did not mention anyone throwing her into the hallway (Tr. 237-38). She said that they did not use condoms (Tr. 239-40). She did not believe that her vagina had been penetrated (Tr. 240-42).

Ms. Flower had a bump on the right side of her scalp and bruising to her face (Tr. 221, 226, 227). She had some bruises and abrasions on her hands, legs, shoulders, and arms, including “fingerprint bruising” on her legs (Tr. 168-69, 221, 222, 223-24, 225, 226, 262). The bruising on her legs was consistent with the way she had told the nurse that she was held (Tr. 227). Some bruising on her right arm appeared to have been made from a “grip” (Tr. 224). The nurse characterized the abrasions on Ms. Flower’s knuckles as “defense wounds” (Tr. 226). There were some chips in her fingernails, which Ms. Flower said occurred while she was struggling (Tr. 226).

The nurse examined the genital and rectal areas of Ms. Flower (Tr. 227-233). The nurse took anal, oral and vaginal swabs for testing (Tr. 239). There were abrasions on Ms. Flower's labia that were indicative of "non-consensual" sex acts or "forced penetration" (Tr. 228, 229-30). There was redness or inflammation at the end of her vagina, which could be caused from penetration or sexual activity and was not usually associated with a consensual act, though it could occur from consensual intercourse (Tr. 230, 231, 242-43, 244). There was a large area of bruising, abrasions, and swelling to the rectal area and rectum (Tr. 232). The nurse opined that the injuries to Ms. Flower's rectal area would have been caused by some type of forced, non-consensual penetration (Tr. 232, 244).

After Mr. Long was identified as a possible suspect (Tr. 271-75), on May 8, a detective took a statement from him (Tr. 277-78). Mr. Long agreed to talk to the officer without an attorney (Tr. 315). He admitted that he had been at a grocery store with Mr. Manning on April 20<sup>th</sup> (Tr. 277). He also said that at that time he was introduced to Ms. Flower (Tr. 278). He noted that the three of them went to his apartment and drank vodka (Tr. 278). Eventually, Mr. Manning and Ms. Flower decided that they were going to have "sex," and Mr. Long joined them (Tr. 278). Ms. Flower performed oral sex on Mr. Manning and Mr. Long, and then passed out on the couch (Tr. 278, 316). There was no anal or vaginal intercourse with Ms. Flower (Tr. 316-17). Mr. Long and Mr. Manning dressed her and put her out of the apartment without her shoes, which Mr. Long later threw away (Tr.

278). When the detective asked Mr. Long if he had been using drugs the night of the alleged attack, he said that he did not want to talk about it (Tr. 278).

A search warrant was obtained to search Mr. Long's apartment on May 3<sup>rd</sup> (Tr. 313, 317). No child pornography was found in his apartment (Tr. 314). There were no items of evidentiary value found in the apartment, such as blood stains or broken fingernails, etc. (Tr. 314). Mr. Long voluntarily gave blood and hair samples for testing (Tr. 315).

## *II. The defense*

Mr. Long testified in his own defense. In April of 2001, he lived in an apartment in North Kansas City (Tr. 413). He denied sexually assaulting Ms. Flower (Tr. 413).

On Saturday, April 21, Mr. Long went to Mr. Manning's trailer to help repair a door and window (Tr. 414). Prior to doing so, he and Mr. Manning went to a grocery store to cash Mr. Manning's unemployment check (Tr. 414). While at the store during the afternoon, Mr. Manning met Ms. Flower and introduced her to appellant (Tr. 416, 452). They decided that they were going to drink and party (Tr. 417). There were no plans to party with anyone else (Tr. 423-24).

After Ms. Flower left, Mr. Long and Mr. Manning eventually went back to the trailer park (Tr. 417). While they were at Mr. Manning's trailer, Ms. Flower rode up on her bicycle (Tr. 418). Mr. Manning did not want his girlfriend to know that he was going to party with Ms. Flower, so he told her to ride up to her trailer and that they would meet her later at her trailer (Tr. 418-49).

Eventually, the three of them left the trailer park and went to Mr. Long's apartment (Tr. 419-20, 421-22). Prior to going there, they stopped at a liquor store and bought a 1.75 liter bottle of vodka at Mr. Flower's request (Tr. 420-21).

While at the apartment, Ms. Flower drank some vodka (Tr. 424-25). Mr. Long and Mr. Manning drank some too, but not as much as Ms. Flower did (Tr. 427, 439). Mr. Long and Mr. Manning smoked some crack cocaine (Tr. 425). Ms. Flower did not smoke any because she was concerned about the effect the drug would have on her medications (Tr. 425-26). While the party was going on, appellant could hear on his answering machine that Ms. Todtenhausen was calling looking for Mr. Manning (Tr. 428-29).

Mr. Long had some pornographic movies of adult males and adult females having sex (Tr. 429, 432).<sup>10</sup> There was no child pornography (Tr. 430). Ms. Flower said that she would be interested in watching the movies (Tr. 433). After watching a movie for about twenty minutes, Mr. Manning asked Ms. Flower if she wanted to "mess around" (Tr. 434-35). Ms. Flower said that she did (Tr. 435). Ms. Flower, who got naked from the waist down, performed oral sex on Mr. Manning (Tr. 435-36). She then performed oral sex on Mr. Long (Tr. 437). She then repeated the act with Mr. Manning (Tr. 437). Shortly thereafter, however,

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<sup>10</sup> At trial, Mr. Long introduced into evidence receipts for the movies that he had rented on April 19, 2001 (Tr. 430-33).

she passed out (Tr. 437-38). Neither Mr. Long nor Mr. Manning ejaculated (Tr. 438).

After Ms. Flower passed out, Mr. Manning and Mr. Long put their clothes back on (Tr. 438, 439). Mr. Long became concerned because he noticed how much alcohol Ms. Flower had drunk while on medication and also because Ms. Flower's breathing seemed "shallow" (Tr. 439-40). They put Ms. Flower's clothes back on, except for her shoes (Tr. 440-41, 443). Her breathing became better and they put her on the couch (Tr. 441-42).

Suddenly Ms. Flower woke up and starting yelling (Tr. 442). Mr. Long tried to calm her down, but Ms. Flower pushed him away and kept yelling (Tr. 442-43). Ms. Flower was hysterical and became violent (Tr. 443). She started tearing up the apartment, so Mr. Manning and Mr. Long decided to force her to leave (Tr. 443-44, 446). Because Ms. Flower was still hysterical, Mr. Long and Mr. Manning had to pick her up and carry her out of the apartment (Tr. 446). There was a struggle to get her out of the apartment with Ms. Flower continuing to fight (Tr. 446-47).

They eventually got Ms. Flower out of the apartment and into the parking lot (Tr. 448). When Ms. Flower was attempting to scratch Mr. Manning, she fell down (Tr. 448). They kept attempting to calm her down so that they could take her home (Tr. 449). Instead, she scratched Mr. Manning's lower neck and tore his shirt (Tr. 448, 449). Because Ms. Flower continued to be hysterical, Mr. Long and Mr. Manning got into Mr. Long's truck (Tr. 449-50). Ms. Flower tried to attack

them when they were in the truck (Tr. 450). Mr. Long and Mr. Manning left in the truck very slowly because Ms. Flower was beating on and grabbing onto the truck (Tr. 451). As soon as Ms. Flower was clear of the truck, they drove off (Tr. 451). When they drove off it was approximately 7:00 p.m.; it was still light outside (Tr. 451-52). Mr. Long did not see Ms. Flower again until trial (Tr. 456).

Mr. and Ms. Bonei lived in the same trailer park as Ms. Flower (Tr. 371, 374). They had known her for about a year (Tr. 371, 374). Mr. Bonei had seen Ms. Flower drink tequila and vodka (Tr. 371). Ms. Flower did not watch television with Mr. and Ms. Bonei (Tr. 372, 374-76).

Leland Tucker lived in the same trailer park as Ms. Flower (Tr. 377-76). He had known her since about 1976 (Tr. 377-78). Ms. Flower's reputation in the community as far as truthfulness was good (Tr. 379).<sup>11</sup>

Timothy Wilson lived at the same trailer park as Ms. Flower (Tr. 381). He had known her for about three to three and a half years (Tr. 381). Her general reputation in the community as to truthfulness was not good (Tr. 381). He had seen Ms. Flower drink beer, vodka, and possibly Jack Daniels (Tr. 382).

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<sup>11</sup> During an earlier offer of proof, Mr. Tucker testified that Ms. Flower "may tell you one thing one day and another the next day. In other words, you don't know from day to day really what [Ms. Flower's] going to come up with." (Tr. 329). He added that she "tries to be honest" (Tr. 329). Her reputation for truthfulness was "far bellow average"; her reputation for honesty was "very good" (Tr. 331).



Mr. Long worked at a business owned by Robert McCartney (Tr. 386). Mr. Long worked on April 23, 2001 (Tr. 387-88). There were no “strange or unusual markings” on Mr. Long’s face or body on that date (Tr. 388). Mr. McCartney did not see any scratch marks on Mr. Long’s face or neck area (Tr. 388, 389).

Kristen Todtenhausen lived in the same trailer park as Ms. Flower (Tr. 403). She never watched cable television with Ms. Flower (Tr. 404). Ms. Todtenhausen dated Mr. Manning for four and a half years (Tr. 405). On the weekend in question, Mr. Long was with Mr. Manning during the day, “in and out” of Ms. Todtenhausen’s residence (Tr. 405, 408-09). Mr. Manning was at her residence at 11:00 p.m., on Saturday night, April 21<sup>st</sup>, 2001 (Tr. 405-06). Appellant was there too (Tr. 406, 410). There were no scratches on Mr. Manning (Tr. 407). Prior to that time, Ms. Todtenhausen called Mr. Long’s apartment looking for Mr. Manning, but no one answered the phone (Tr. 407, 410-11). To her knowledge, both Mr. Manning and Mr. Long were heterosexual (Tr. 407). She previously had been with Mr. Long in “a sexual way” (Tr. 411-12).

Sharrie Clark was the Property Manager at Lakeview Terrace Mobile Home Park (Tr. 528-29). She had known Ms. Flower for three or four years (Tr. 529). Ms. Flower’s general reputation in the community for truthfulness and honesty was not good (Tr. 529).

Hair and blood samples were collected from Mr. Long (Tr. 488-89). The crime scene technician who took pubic hair samples from Mr. Long did not notice

any bite marks Mr. Long's penis, although he might not have looked at it (Tr. 489-90).

A criminalist for the Kansas City Police Department examined the sexual assault kit obtained from Ms. Flower as well as her clothing (Defendant's Exhibit Nos. 32, 33, 34).

Regarding the sexual assault kit, the criminalist did not find the presence of sperm, seminal fluid or acid phosphatase (an enzyme found in seminal fluid) (Defendant's Exhibit No. 32; Tr. 502-03). Those substances were not found on the vaginal, rectal, or oral smears taken from Ms. Flowers (Defendant's Exhibit No. 32; Tr. 502-03).

Regarding Ms. Flower's clothing, there were no seminal fluids or acid phosphatase indicated on her clothing, which included her shirt, her shorts, her underwear and her socks (Tr. 502-03; Defendant's Exhibit No. 32). Her shirt tested positive for the presence of saliva (Defendant's Exhibits Nos. 32). DNA profiling indicated that Ms. Flower was the source of apparent saliva stains on her shirt, although one stain also indicated the possible presence of a male individual (Defendant's Exhibit Nos. 32, 33). There also was a brown stain on her shirt that tested presumptively for blood; the DNA obtained from this stain was excessively degraded, but a partial genetic profile matching the genetic profile of Ms. Flower was obtained at several loci (Defendant's Exhibit Nos. 32, 34). Her shorts tested positive for the presence of saliva (Defendant's Exhibit No. 32). DNA profiling

indicated that Ms. Flower was the source of apparent saliva stains on her shorts (Defendant's Exhibit Nos. 32, 33).

### ***III. Procedural matters***

Mr. Long was charged by substitute information as a prior and persistent offender with forcible rape, Section 566.030 (Count I) and forcible sodomy (Counts II) (L.F. 8-9).

On December 10-12, 2002, a jury trial was held in the Circuit Court of Clay County before the Hon. Michael J. Maloney, Judge, (L.F. 2-3). During the course of trial, Mr. Long made numerous offers of proof from witnesses Leland Tucker (Tr. 328-36), Kevin Bonei (Tr. 336-50), Timothy Wilson (Tr. 352-368), Kristen Todtenhausen (Tr. 393-98), Mr. Long (Tr. 479-82), and Sharrie Clark (Tr. 504-18) concerning matters that Ms. Flower had done and said. Those offers of proof are summarized in Points I, V, and VI of this brief, *infra*, which Mr. Long incorporates by reference. To avoid needless repetition, Mr. Long will not repeat those summaries verbatim here.

After the foregoing evidence was presented, the trial court overruled Mr. Long's motion for judgment of acquittal (Tr. 519-20, 531; L.F.15-16). Subsequently, the jury found Mr. Long guilty of the charged offenses (Tr. 580-81; L.F. 28-29).<sup>12</sup>

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<sup>12</sup> Because Mr. Long was found to be a prior offender (Tr. 303-05), the jury did not recommend punishment (L.F. 28-29).

The trial court granted Mr. Long twenty-three days to file a motion for new trial (January 4<sup>th</sup>, 2002), which was filed on January 4, 2002 (Tr. 581-82; L.F. 30-41). The trial court overruled the motion for new trial (Tr. 595)

On February 7, 2002, the trial court sentenced Mr. Long to consecutive sentences of twenty years imprisonment on both counts (Tr. 601; L.F. 42-43).

On February 11, 2002, Mr. Long timely filed a notice of appeal, in *forma pauperis* (L.F. 44, 45-47; Tr. 608). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

## **POINTS RELIED ON**

### **I.**

**The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, namely evidence, through the proffered testimonies of Timothy Wilson, Sharrie Clark, and Officer Cummings, that Ms. Flower had falsely accused Mr. Wilson of sexually assaulting her, of physically assaulting her, and of threatening her, on three different occasions, and later recanted her accusations regarding all three events, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, in that this excluded evidence was relevant to challenge Ms. Flower's veracity and was relevant because it would have supported appellant's defense that Ms. Flower had a history or tendency to make false reports, including sexual allegations, either because of mental abnormality or alcohol impairment, and later recant them. (Point III in Western District)**

*State v. Montgomery*, 901 S.W.2d 255 (Mo. App. E.D. 1995);

*State v. Lampley*, 859 S.W.2d 909 (Mo. App. E.D. 1993);

*State v. Williams*, 492 S.W.2d 1 (Mo. App. E.D. 1973);

*State v. Scott*, 78 S.W.3d 806 (Mo. App. S.D. 2002);

U.S. Const., Amends. VI, and XIV; and

Section 491.015.

## II.

The trial court erred in overruling Mr. Long's motion for judgment of acquittal at the close of all of the evidence and in sentencing him upon his conviction for forcible rape, Section 566.030, because the State did not prove beyond a reasonable doubt that either Mr. Long or his codefendant (Manning) had sexual intercourse with Ms. Flower, in violation of Mr. Long's right to due process of law as guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution and Art. I, Section 10 of the Missouri Constitution, in that there was insufficient evidence that any alleged penetration of Ms. Flower's sex organ was by either Mr. Long's or Mr. Manning's sex organ; Ms. Flower said that she did not think that either suspect had sexual intercourse with her, though she was not sure; no semen or sperm was found; and the examining nurse only testified that Flower's physical examination of her sex organ revealed abrasions of her labia and inflammation of the vagina, indicative of some sort of non-consensual sex act or forced penetration, but did not testify that such injuries were the result of penetration by the male sex organ as opposed to some other source. (Point I in Western District)

*State v. Whalen*, 49 S.W.3d 181 (Mo. banc 2001);

*State v. Keeler*, 856 S.W.2d 928 (Mo. App. S.D. 1993);

*State v. Dawson*, 985 S.W.2d 941 (Mo. App. W.D. 1999);

*In re Winship*, 397 U.S.358 (1970);

U.S. Const., Amend. XIV;

Mo. Const. Art. I, Section 10; and

Section 566.010(4) and 566.030.

### III.

The trial court abused its discretion in sending Deborah Flower's typed statement (State's Exhibit 26 & Court's Exhibit No. 45) to the jury during its deliberation, over Mr. Long's objections, because that action violated Mr. Long's right to a fair trial by a fair and impartial jury as well as his right to due process as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that that exhibit was testimonial in nature, which resulted in Ms. Flower's testimony being unduly bolstered and emphasized, allowing the jury to give it undue weight, as the jury had an opportunity to read it one or more additional times during deliberation, whereas Mr. Long's oral testimony from the stand was heard only once. (Point VII in Western District)

*O'Neal v. Pipes Enterprises, Inc.*, 930 S.W.2d 416 (Mo. App. W.D. 1995);

*State v. Brooks*, 675 S.W.2d. 53 (Mo. App. S.D. 1984);

*State v. Evans*, 639 S.W.2d 792 (Mo. banc 1982);

*State v. Poe*, 458 S.E.2d 242 (N.C. App. 1995);

U.S. Const., Amend. VI and XIV; and

Mo. Const. Art. I, Sections 10 and 18(a).



#### **IV.**

**The trial court abused its discretion in not disclosing to the defense the psychological, psychiatric, and medical records of Deborah Flower (Exhibits Nos. 47, 49, 50), because such ruling violated Mr. Long's rights to confront the witnesses against him, to due process and a fair trial, to compulsory process, and to present a defense, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this precluded Mr. Long from fully exploring Flower's credibility, bias, and her ability to discern reality on the day of the charged offense and during her testimony. Mr. Long was precluded from discovering possible evidence of false reports, of a history of psychiatric disorders manifesting themselves in manipulative and destructive conduct, of mental disorders having a high probative value on the issue of credibility, and of mental defects that materially affected the accuracy of Ms. Flower's testimony or tended to produce bias in her testimony. Further, there was a waiver of the privilege since the jury was informed by the state, including through Ms. Flower's testimony, that she was "mentally handicapped," had "a caseworker through Tri-County," received "disability income," and was taking several medications for her disability. (Point II in Western District)**

*United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983)

*United States v. Society of Independent Gasoline Marketers of America*,  
624 F.2d 461 (4th Cir. 1979)

*Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. banc 1993)

*Davis v. Alaska*, 415 U.S. 308 (1974)

U.S. Const., Amends. VI, and XIV;

Mo. Const. Art. I, Sections 10 and 18(a); and

Section 491.060.

## V.

**The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, through the proffered testimonies of Timothy Wilson and Kevin Bonei that Ms. Flower engaged in sexually provocative actions when she was drinking alcohol, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, in that this excluded evidence was relevant because it would have supported Mr. Long's defense that Ms. Flower became intoxicated, engaged in some consensual sexual acts, and then, possibly due to the effect that the alcohol had on medications that she had been prescribed due to her mental illness, she became hysterical and misconstrued what was going on. (Point IV in Western District)**

*State v. Douglas*, 797 S.W.2d 532 (Mo. App. W.D. 1990);

*State v. Scott*, 78 S.W.3d 806 (Mo. App. S.D. 2002)

*State v. Ray*, 945 S.W.2d 462 (Mo. App. W.D. 1997);

*Olden v. Kentucky*, 488 U.S. 227 (1990);

U.S. Const., Amends. V, VI, and XIV; and

Section 491.015.

## VI.

**The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, through the proffered testimonies of Leland Tucker, Kevin Bonei, Kristen Todtenhausen, Timothy Wilson, and appellant, that Ms. Flower had concocted a bizarre story of having broken the neck of someone who had attempted to rape her, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, in that this excluded evidence was relevant because it would have supported Mr. Long's defense that Ms. Flower would make up bizarre tales of sexual assaults. (Point V in Western District)**

*State v. Ray*, 945 S.W.2d 462 (Mo. App. W.D. 1997);

*State v. Richardson*, 838 S.W.2d 122 (Mo. App. E.D. 1992);

*State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991);

*State v. Scott*, 78 S.W.3d 806 (Mo. App. S.D. 2002);

U.S. Const., Amends. VI, and XIV; and

Section 491.015.

## **ARGUMENT**

### **I.**

**The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, namely evidence, through the proffered testimonies of Timothy Wilson, Sharrie Clark, and Officer Cummings, that Ms. Flower had falsely accused Mr. Wilson of sexually assaulting her, of physically assaulting her, and of threatening her, on three different occasions, and later recanted her accusations regarding all three events, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, in that this excluded evidence was relevant to challenge Ms. Flower's veracity and was relevant because it would have supported appellant's defense that Ms. Flower had a history or tendency to make false reports, including sexual allegations, either because of mental abnormality or alcohol impairment, and later recant them. (Point III in Western District)**

#### ***A. Transfer question***

The transfer question granted by this Court is:

In a case where the defense is that the alleged victim, who is taking several psychoactive drugs, is making a false allegation of rape & sodomy because of a combination of mental abnormality and drug/alcohol impairment, should the defense be allowed to present evidence, bearing directly on the alleged victim's credibility, that she made other *false accusations and*

*police reports* of being sexually assaulted, physically assaulted, and threatened, on three other occasions within a two year period overlapping the charged offense, including one a few months after the charged offense, and later recanted her accusations regarding all three events?

By holding that Mr. Long could not show the jury that the alleged victim made other false claims of physical and sexual assault, including false reports to the police, the Western District's opinion is contrary to previous opinions of this state, *State v. Williams*, 492 S.W.2d 1 (Mo. App. E.D. 1973), *State v. Montgomery*, 901 S.W.2d 255, 256-57 (Mo. App. E.D. 1995) and *State v. Lampley*, 859 S.W.2d 909, 911 (Mo. App. E.D. 1993).

### ***B. Offers of Proof***

#### ***(1) Timothy Wilson***

Timothy Wilson lived in the same trailer park as Ms. Flower (Tr. 353, 381). He had known her for about three or three-and-a-half years (Tr. 353, 381). One evening, about a year-and-a-half before trial,<sup>13</sup> Mr. Wilson found Ms. Flower lying on the corner of the street, inches from Mr. Wilson's yard (Tr. 359-60, 364). She was talking about "space ships, angels coming down to receive her and take her away" (Tr. 360). There was a small pool of blood surrounding her head (Tr. 360).

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<sup>13</sup> Trial was held December 10-12, 2001, which would mean that the incident occurred around June of 2000. The crime was alleged to have occurred on or about April 20, 2001.

When the police and an ambulance arrived on the scene, Ms. Flower falsely accused Mr. Wilson of hitting her with a rock (Tr. 360, 361). Later she admitted that she had fell off of her bicycle and struck her head on the concrete (Tr. 361).

In the summer of 2001,<sup>14</sup> Ms. Flower accused Mr. Wilson of threatening her (Tr. 357). Later, she recanted her story by leaving a voice message on Mr. Wilson's home telephone service (Tr. 358). In that message she said that if any officer had arrested or detained Mr. Wilson for anything concerning her, or for any crimes allegedly committed by Mr. Wilson against her, they had the wrong person, that he had not done anything to her (Tr. 358). Mr. Wilson kept the recording of Ms. Flower's message (Tr. 358).

The trial court ruled that Mr. Wilson could not testify about his arrest for allegedly threatening Ms. Flower or the episode of where she was found on the street (Tr. 364-68). Mr. Long raised the issues in his motion for new trial (L.F. 37-38, 40; claims 11, 14).

## *(2) Detective Gail Cummings*

In a related offer of proof, Detective Gail Cummings testified that in the summer following the alleged crime, Ms. Flower reported that she had been threatened by Mr. Wilson (Tr. 295-96). Ms. Flower later called Detective Cummings and said that she had been mistaken; the suspect who had threatened

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<sup>14</sup> This would be after the date of the offenses charged in this case.

her was not Mr. Wilson (Tr. 297-98). Charges were never filed on Mr. Wilson (Tr. 298, 299).

Mr. Long argued that the incident showed how Ms. Flower could be mistaken about allegations and that Ms. Flower has a tendency to make false or mistaken police reports (Tr. 299-301). The trial court sustained the state's relevancy objection (Tr. 301-02).

Mr. Long raised the issue in his motion for new trial (L.F. 37-38; claim 11).

*(3) Sharrie Clark*

Ms. Sharrie Clark is the property manager of the mobile home where Ms. Flower lived (Tr. 505). She had known Ms. Flower for three to four years (Tr. 505). About two years before trial, Ms. Flower told Ms. Clark that Mr. Wilson had knocked on her door, and when she opened it up he said he worked as security for the trailer park (Tr. 506). Ms. Flower then told Ms. Clark that when she stepped outside, Mr. Wilson put his finger up her privates (Tr. 506-07). Ms. Clark told her that she needed to call the police (Tr. 507). Ms. Flower told her that it had happened several days prior to her reporting it to Ms. Clark (Tr. 507).

About two weeks after Ms. Flower's complaint, Ms. Flower called Ms. Clark and said that Ms. Clark must have misunderstood what she said (Tr. 508). Ms. Clark replied that she did not misunderstand especially since Ms. Flower had used vulgar words when she said where Mr. Wilson put his finger, particularly since Ms. Flower had said the same thing three or four times during the initial complaint (Tr. 508). Ms. Flower then said, "oh, no, well, that's not what I meant



to say” (Tr. 508). Ms. Flower also told Ms. Clark that Mr. Wilson was a friend and would never do anything like that to her (Tr. 508).

Mr. Long argued that the offer of proof showed that Ms. Flower had a history or tendency to make false reports of sexual allegations and later recant them and thus was relevant as to her credibility in this case, *citing State v. Lampley*, 859 S.W.2d 909 (Tr. 509-10, 514-15). After some debate, the trial court opined that evidence of false accusations of sexual abuse made by a victim were admissible (Tr. 516-17). The trial court later changed that ruling, however, and ruled that evidence inadmissible (Tr. 517-18).

Mr. Long raised the issue in his motion for new trial (L.F. 36; claim 9). The trial court overruled that motion (Tr. 595).

The Western District denied this point holding that Mr. Long was properly limited to offering evidence regarding Flower’s general reputation for truth and veracity in the community, and therefore the trial court did not abuse its discretion in excluding the testimony of Wilson, Clark, and Cummings regarding the prior false claims. *State v. Long*, No. WD61050, slip op. at 11, (Mo. App. W.D. 2003). The court recognized that the Eastern District has permitted such evidence in a number of cases, such as *State v. Montgomery*, 901 S.W.2d 255, 256-57 (Mo. App. E.D. 1995) and *State v. Lampley*, 859 S.W.2d 909, 911 (Mo. App. E.D. 1993). But the Western District attempted to distinguish those cases by arguing that in those cases, “the prior false reports were relevant not just on the general issue of the complaining witness’ truth or veracity, but also to show that the

complaining witness had a motive to testify falsely,” whereas in this case “there is no allegation that Flower’s testimony against Long was prompted by a motive to testify falsely or that the excluded testimony was relevant to show such a motive.” *Id.* slip op. at 12. The court did not attempt to distinguish *State v. Williams*, 492 S.W.2d 1 (Mo. App. E.D. 1973).

### ***C. Standard of Review***

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). While this Court generally will not interfere with the trial court’s ruling on the admission or exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.*

### ***D. Mr. Long was deprived of his right to present relevant evidence to the jury***

“The Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citing, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)); *Olden v. Kentucky*, 488 U.S. 227 (1990). The denial of the opportunity to present relevant and competent evidence negating an essential element of the state’s case may constitute denial of due process. *Ray*, 945 S.W.2d at 469. Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). If the defendant is deprived of the testimony of a defense witness, it may violate the defendant’s rights under the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. *Id.*

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. **Ray**, 945 S.W.2d at 467. Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. **State v. Richardson**, 838 S.W.2d 122, 124 (Mo. App. E.D. 1992). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. **State v. Brown**, 549 S.W.2d 336, 340 (Mo. banc 1977). Evidence that Ms. Flower had a history of falsely accusing people of sexually and physically assaulting her, which was excluded, was vital evidence for Mr. Long since that was his defense, i.e., Flower was falsely accusing him because of her mental illness combined with her usage of drugs and alcohol. See, **State v. Pierson**, 85 S.W.2d 48, 54-55 (Mo. 1935) (trial court erred in excluding evidence that witness was so mentally impaired that he could not give a trustworthy account of matters about which he undertook to speak). Yet the jury was precluded from hearing such crucial evidence.

“Motive for false accusation of one charged with a crime by a witness for the State is a proper subject for inquiry in a criminal prosecution, and evidence to prove the motive may be developed either by cross-examination or by impeachment.” **State v. Lampley**, 859 S.W.2d 909, 911 (Mo. App. E.D. 1993). *In accord*, **State v. Hedrick**, 797 S.W.2d 823, 828 (Mo. App. W.D. 1990) (evidence

of tempestuous post divorce relations between family members as they related to prosecutrix and her relations to each was admissible to impeach daughter).

In *State v. Montgomery*, 901 S.W.2d 255, 256 (Mo. App. E.D. 1995), the defendant sought to introduce evidence that the complaining witness, alleging sodomy, had previously made five other accusations of sexual abuse. *Id.* at 256. There were four incidents involving five persons. *Id.* The Court stated that the past allegations went to the witness' credibility because she may "have had a motive to falsely accuse defendant . . . to get her mother's attention by making allegations of sexual abuse." *Id.* at 257. Because the alleged victim's credibility was the paramount issue at trial, the cause was remanded for a new trial. *Id.*

In *Lampley*, the defendant argued that a stepdaughter's previous complaint of sexual abuse was relevant to show "previous knowledge of sexual matters and how she benefited [sic] from the prior complaint." 859 S.W.2d at 910. The evidence showed that the prior abuse complaint resulted in removal of the subject of the complaint from the stepdaughter's house. *Id.* at 911. The defendant argued that the stepdaughter did not like him and "accusing him of sexual molestation was a way of getting him out of her home." *Id.* The defendant argued that he should have been allowed to question his stepdaughter about the prior complaint to determine if she had any possible motive to fabricate the complaint against him. *Id.*

The *Lampley* court reversed his convictions, holding that a limited inquiry about the prior complaint was permissible. *Id.* at 912. Therefore, "the trial court's

view that reference to the prior incident is ‘totally irrelevant’ is patently wrong.”

*Id.*

Mr. Long acknowledges that under the rape shield statute, **Section 491.015**, generally evidence of specific instances of a complaining witness’ prior sexual conduct is inadmissible. Notwithstanding the rape shield statute, regarding the above mentioned offers of proof, it was not Mr. Long’s purpose to show that Ms. Flower had engaged in the prior sexual activity with Mr. Wilson. Rather, Mr. Long intended to that the alleged prior act had not occurred. The rape shield statute did not apply to the above proffered evidence. *See, State v. Scott*, 78 S.W.3d 806, 810 (Mo. App. S.D. 2002) (the rape shield statute does not preclude introduction of evidence of prior allegations by an alleged victim of sexual abuse if that evidence is offered to impeach the credibility of the victim as a witness; evidence of a victim’s prior false complaints does not fall within the ambit of the rape shield statute). *Also see, Brown v. Commonwealth*, 510 S.E.2d 751 (Va. App. 1999) (evidence of witness’ prior testimony in an unrelated rape prosecution, when offered to show its substantial similarity for the purpose of testing the credibility of the witness, did not fall within the rape shield law).

Here, Mr. Long had evidence of his innocence; namely, evidence that Ms. Flower falsely accused people of crimes, sometimes of a sexual nature as in the instant case. Mr. Long also had evidence that Ms. Flower sometimes hallucinated and made false accusations. Unfortunately, the jury was unable to hear this important evidence. Mr. Long was entitled to produce evidence of Ms. Flower’s

false reports and allegations. *See, State v. Williams*, 492 S.W.2d 1 (Mo. App. E.D. 1973).

In *Williams*, *supra*, the State was permitted to show that a defense witness had given a false police report in an unrelated case. The *Williams* court allowed this inquiry, holding: “The questions therefore concerned a specific instance about which Mrs. Jones may have lied or made a false report. This goes directly to her veracity. If she cannot be trusted to make a truthful report to authorities, the jury may reasonably infer that she cannot be trusted on the witness stand.” *Williams*, 492 S.W.2d at 6. The same applies to Long’s case and the Western District’s opinion is thus contrary to *Williams*.

This Court recently addressed the *Williams* case in *State v. Wolfe*, 13 S.W.3d 248 (Mo. banc 2000). In Judge Wolff’s dissenting opinion, concurred with by Judge White, he wrote that prior instances of false reports to the police are certainly relevant and, thus, are proper subjects for cross-examination:

In Missouri, witnesses may be impeached by showing their bad character for truth and veracity, and this character may be shown by specific acts of misconduct as to truth and veracity. *See* JOHN O'BRIEN, MISSOURI LAW OF EVIDENCE section 5-7 (3d ed.1996) (discussing cases).

Specifically, a prior false report to law enforcement authorities is relevant on the issue of [the witnesses] credibility. As the court said in State v. Williams, 492 S.W.2d 1 (Mo.App. 1973): “If she cannot be trusted to make

a truthful report to authorities, the jury may reasonably infer that she cannot be trusted on the witness stand.” 492 S.W.2d at 6.

**Wolfe**, 13 S.W.3d at 274 (Wolff, J., dissenting).

Further, the majority opinion in **Wolfe** did *not* reject **Williams**; rather they merely distinguished it:

The dissenting opinion relies on *State v. Williams*, 492 S.W.2d 1, 6-7 (Mo.App.1973) to argue that a false report to police is admissible regardless of how remote in time. In *Williams*, the false report occurred “recently” before trial. *Id.* at 3. False reports to police are evaluated for relevance the same as other evidence. The trial judge did not abuse her discretion in refusing to admit evidence of the juvenile incident

**Wolfe**, 13 S.W.3d at 258.

Thus, while the majority opinion in **Wolfe** found the excluded evidence there was properly excluded because the prior false report was over ten years old and thus was remote, the opinion still allows for the admissibility of false reports *if* closer in time to the charged offense. Here, there is no remoteness problem: the false reports were within a two-year-period overlapping the charged offense, including one false report made only three months after the charged crime. And, the evidence here is more relevant because it involves similar false reports made by the alleged victim. Thus, under **Wolfe**, this evidence was admissible. *Also see*, **State v. Robinson**, 835 S.W.2d 303, 306 (Mo. banc 1992) (noting that the State had a duty to disclose psychiatric record of the victim, which resulted in the

defendant being able to show the jury “previous apparently false reports” of alleged rapes, such that the victim was labeled a “chronic reporter”).

The exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). “[T]he erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which ‘can only be overcome by a showing that such erroneous exclusion was harmless beyond a reasonable doubt.’” *State v. Bowlin*, 850 S.W.2d 116, 118 (Mo. App. S.D. 1993). This Court cannot declare the admission of this evidence harmless beyond a reasonable doubt. Ms. Flower claimed that Mr. Long had committed the crimes; Mr. Long denied it. Mr. Long made no confession. There was no independent eyewitness to the alleged crimes. Although there was some medical testimony to support that someone had done something to Ms. Flower, there was no medical evidence linking appellant to those acts. When a search warrant was executed to search Mr. Long’s apartment, there was no evidence recovered that showed that Ms. Flower was sexually assaulted there by Mr. Long. Although Ms. Flower testified she scratched Mr. Long’s neck and face, there was no evidence of scratches; in fact, a witness testified that Mr. Long did not have any scratches (Tr. 388-89). Consequently, the trial court’s rulings operated to deprive Mr. Long of his rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. Mr. Long is entitled to a new trial.



## **II.**

**The trial court erred in overruling Mr. Long's motion for judgment of acquittal at the close of all of the evidence and in sentencing him upon his conviction for forcible rape, Section 566.030, because the State did not prove beyond a reasonable doubt that either Mr. Long or his codefendant (Manning) had sexual intercourse with Ms. Flower, in violation of Mr. Long's right to due process of law as guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution and Art. I, Section 10 of the Missouri Constitution, in that there was insufficient evidence that any alleged penetration of Ms. Flower's sex organ was by either Mr. Long's or Mr. Manning's sex organ; Ms. Flower said that she did not think that either suspect had sexual intercourse with her, though she was not sure; no semen or sperm was found; and the examining nurse only testified that Flower's physical examination of her sex organ revealed abrasions of her labia and inflammation of the vagina, indicative of some sort of non-consensual sex act or forced penetration, but did not testify that such injuries were the result of penetration by the male sex organ as opposed to some other source. (Point I in Western District)**

### ***A. Introduction***

Mr. Long was charged in Count I with forcible rape, **Section 566.030**, with acting in concert with Christian Manning, in that "the defendant or Christian Manning had sexual intercourse with Deborah Flower" (L.F. 23). The trial court

erred in overruling Mr. Long's motion for judgment of acquittal as to that count (Tr. 519-20, 531; L.F. 15-16), and in sentencing Mr. Long (Tr. 601; L.F. 42-43), because there was insufficient evidence that either Mr. Long or Mr. Manning had sexual intercourse with Ms. Flower, as that term is defined in **Section 566.010(4)**. Because Mr. Long's conviction on Count I was not supported by sufficient evidence, Mr. Long was deprived of his right to due process as guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

### ***B. Standard of Review***

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). It is the State's burden to prove each and every element of a criminal offense. *State v. Keeler*, 856 S.W.2d 928 (Mo. App. S.D. 1993).

In reviewing a challenge to sufficiency of the evidence, this Court considers whether, in light of the evidence, the jury could reasonably have found Mr. Long guilty beyond a reasonable doubt of the charged offense. *State v. Dawson*, 985 S.W.2d 941, 951 (Mo. App. W.D. 1999). In applying this standard, this Court must look to the elements of the crime and consider each in turn, taking the evidence in the light most favorable to the state and granting the state all reasonable inferences from the evidence. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993), *cert. denied*, 510 U.S. 997 (1993). This Court disregards

contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *Id.* But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001).

### *C. Discussion*

Mr. Long was charged in Count I with forcibly raping Ms. Flower (L.F. 8). The verdict directing instruction regarding that offense charged Mr. Long with acting in concert with Christian Manning (L.F. 23). However, the evidence did not prove beyond a reasonable doubt that Ms. Flower's sex organ was penetrated by either Mr. Long's or Mr. Manning's sex organ. Therefore, there was insufficient evidence to convict Mr. Long of Count I.

When Ms. Flower was asked, "Did either man force their penis into your vagina?", she responded that she did not "feel them go in my vagina." (Tr. 190). She did not think that either suspect put their penis in her vagina, though she was not sure since she "kept fading in and out" (Tr. 191, 240-42).

The nurse who examined Ms. Flower, Ms. Albaugh, testified that she examined Ms. Flower's sex organ (Tr. 228-233, 240-44). There was no semen or sperm (Tr. 233-34, 239, 502-02; Defendant's Exhibit No. 32). There were some abrasions to the labia, which were indicative of "non-consensual sex acts" or some kind of "forced penetration" (Tr. 228-29). There was also some redness or inflammation at the end of the vagina, which "is caused from penetration" and is

“indicative of sexual activity” (Tr. 230-31, 242). Such redness could occur from consensual intercourse (Tr. 242-44).

Forcible rape is committed if the defendant “has sexual intercourse with another person by the use of forcible compulsion” **Section 566.030.1**. Sexual intercourse is defined as “any penetration, however slight, of the female sex organ *by the male sex organ*, whether or not an emission results.” **Section 566.010(4)** (emphasis added).

So, it was incumbent upon the State to prove that any alleged penetration of Ms. Flower’s sex organ was by either Mr. Long’s or Mr. Manning’s “sex organ.” Here, the State failed to do so.

Ms. Flower said that she did not think that she was raped (Tr. 190-91, 240-42). There was no sperm or semen found (Tr. 233-34, 239, 502-03; Defendant’s Exhibit No. 32), which is consistent with her belief that she was not raped.

Although Ms. Albaugh indicated that there was some redness of Ms. Flower’s vagina and abrasions on Ms. Flower’s labia (Tr. 228-33, 240-44), she did not testify that these injuries were caused by penetration by the male sex organ. Ms. Albaugh did testify that the injuries were indicative of “non-consensual sex acts” or “sexual activity” or some kind of “forced penetration” (Tr. 228-29, 230-31, 242). But since she did not indicate that such acts would necessarily be caused by the male sex organ it is possible such “sex acts” or activity were other than by the male sex organ. Although this Court might speculate that the injuries might have been caused by the penetration of either of the suspect’s sex organs, this

Court may not supply missing evidence, or give the state the benefit of speculative or forced inferences. *Whalen*, 49 S.W.3d at 184.

The Western District correctly noted that Flowers didn't think that she had been penetrated, and that while she thought she might have been, "Proof that something *might* have happened or *could have* occurred is not, without something more, sufficient to sustain the State's burden of proof beyond a reasonable doubt of each element of the crime." *State v. Long*, No. WD61050, slip op. at 5, (Mo. App. W.D. 2003). The court also correctly noted that there was no testimony by Flowers that Mr. Long had sexual intercourse with her, as to allow a reasonable inference of penetration of the vagina by the male sex organ. *Id.*, slip op. at 5.

Nevertheless the Western District found that the following medical evidence permitted a reasonable inference of penetration by the male sex organ. A nurse testified, "The positioning of a person, with non-consensual sex you have less cooperation between partners. You don't have the pelvic tilt upward accommodating the penis. You don't have the lubrication of the vaginal area. So it's like getting a rug burn from friction in that area." *Id.*, slip op. at 7. The court found that "this evidence indicated that it was the nurse's opinion that the injuries were caused by forcible penetration of the victim's vagina by a male sex organ. While the nurse did not directly state that Flower's vagina was penetrated by a male sex organ, there was sufficient evidence to support a reasonable inference that such penetration took place." *Id.*, slip op. at 8.

The Western District read too much into this testimony. Just because the nurse used the word “penis” in Ms. Albaugh’s explanation as to why, in general, there would be abrasions “from non-consensual sex acts” does not mean that the nurse believed that the abrasions came from a penis in this case. Other items also could have caused abrasions. *See, State v. Sipes*, 651 S.W.2d 659, 661 (Mo.App. S.D. 1983) where a physician testified that if a foreign body, such as a hammer, had passed the lips of the vagina it ordinarily would leave abrasions or scratches or bruising of the lining of the vaginal canal. Here, Ms. Albaugh was never asked, and never testified, that in her opinion the injuries to Flower’s vaginal area were from a penis instead of some other object. (Indeed, it would be shocking for an expert to testify that they could tell the injury was from a penis rather than another instrument when there is no evidence of semen, sperm, or something else that would indicate that a penis was used).

Based upon the foregoing reasons, this Court should reverse Mr. Long’s conviction for forcible rape under Count I and order Mr. Long discharged as to that count.

### **III.**

**The trial court abused its discretion in sending Deborah Flower's typed statement (State's Exhibit 26 & Court's Exhibit No. 45) to the jury during its deliberation, over Mr. Long's objections, because that action violated Mr. Long's right to a fair trial by a fair and impartial jury as well as his right to due process as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that that exhibit was testimonial in nature, which resulted in Ms. Flower's testimony being unduly bolstered and emphasized, allowing the jury to give it undue weight, as the jury had an opportunity to read it one or more additional times during deliberation, whereas Mr. Long's oral testimony from the stand was heard only once. (Point VII in Western District)**

The trial court abused its discretion in sending Deborah Flower's typed-statement to the jury during its deliberation, over Mr. Long's objections. This deprived Mr. Long of his rights to due process and a fair trial, as guaranteed under the United States and Missouri Constitutions.<sup>15</sup>

#### ***A. Facts***

After Ms. Flower testified, and after the direct testimony of Detective Gail Cummings, who took a typed statement from Flower, the State offered the

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<sup>15</sup>**U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, Secs. 10 and 18(a).**

statement into evidence (Tr. 276). The trial court sustained Mr. Long's objection to that statement (Tr. 276).

After the cross-examination of Cummings, however, the trial court overruled Mr. Long's objection to that statement based upon defense counsel's reference to the statement during the cross-examination (Tr. 319). Defense counsel pressed his concern "that once it becomes a piece of evidence it may go the jury room later and be given undue weight compare to others" (Tr. 319). The trial court noted that "going into the jury room is a separate issue" and overruled Mr. Long's objection to the exhibit (Tr. 319).<sup>16</sup>

During deliberation, the jury requested Ms. Flower's statement (Tr. 564-65). Mr. Long objected, noting that undue weight would be given to Ms. Flower's testimony more than the rest of the testimony in the case, violating Mr. Long's due process rights (Tr. 565-66). Mr. Long also objected to "extraneous parts" that were included in the statement (Tr. 565-66). The trial court allowed the statement

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<sup>16</sup> The trial court's ruling was incorrect. *See State v. Cole*, 867 S.W.2d 685 (Mo. App. E.D. 1993) (playing entire tape recorded statement of eyewitness for jury after eyewitness had been impeached with prior inconsistent statements from tape, was improper bolstering in that it substantially repeated eyewitness' in-court testimony). Although there was an objection to the admission of this exhibit, Mr. Long's motion for new trial only raised as a claim of error the submission of it to the jury during deliberation (L.F. 35-36; claim 8).



to be redacted, excluding some portions of the statement, but allowed the redacted exhibit to go to the jury during its deliberation (Tr. 566-74; State's Exhibit No. 26, Court's Exhibit No. 45; Appendix).<sup>17</sup>

### ***B. Standard of Review***

Whether a jury may take an exhibit into the jury room during deliberation rests within the sound discretion of the trial court. *State v. Barnett*, 980 S.W.2d 297 (Mo. banc 1998). An abuse of discretion occurs when the trial court's decision to exclude an exhibit from the jury room is clearly against reason and results in an injustice to the defendant. *Id.*

### ***C. Discussion***

Missouri permits non-testimonial exhibits such as documents or photographs to be sent to the jury room at the trial court's discretion. *O'Neal v. Pipes Enterprises, Inc.*, 930 S.W.2d 416, 421 (Mo. App. W.D. 1995) (Stith, P.J.). But Missouri courts have repeatedly held that exhibits that are testimonial in nature cannot be given to the jury during its deliberation. *Id.* In accord, *State v. Evans*, 639 S.W.2d 792, 795 (Mo. banc 1982) and *State v. Brooks*, 675 S.W.2d 53, 57 (Mo. App. S.D. 1984). The rationale for this prohibition is that testimonial

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<sup>17</sup> Court's Exhibit No. 45 shows the statement prior to the redactions, along with pen marks showing what parts should be redacted. State's Exhibit No. 26 has pieces of paper taped over the parts that were to be redacted. The jury got a copy of that exhibit so that the jury could not look under the taped paper (Tr. 567-73).

exhibits would unduly bolster and emphasize some of the testimony which might result in the jury giving it undue weight. *Evans, supra*. The only exception to this rule is when the testimonial exhibit contains a written or recorded confession of a defendant in a criminal case. *Id.*

In *O'Neal v. Pipes Enterprises, Inc.*, the Western District Court of Appeals held that the trial court committed reversible error when it replayed videotaped deposition testimony for the jury during its deliberation. *O'Neal*, 930 S.W.2d at 420-21. The *O'Neal* Court was “concern[ed] that repetition of a portion of trial testimony would cause that portion to be emphasized by reiteration, which in turn “might lead to interminable confusion or to an unwarranted advantage to one party over the other,” and would “further invade a juror’s duty to solely determine the facts according to his or her memory alone.” *Id.* at 421.

Flower’s typed-statement was testimonial in nature; it was a detailed four page typed statement wherein Flower gave her version of what happened and answered questions by Detective Cummings. *Brooks*, 675 S.W.2d. at 57 (discussing why depositions should not be allowed to go to the jury during deliberation); *State v. Jennings*, 815 S.W.2d 434 (Mo. App. E.D. 1991) (a recorded witness statement that was sent to the jury during deliberations was considered “testimonial,” but no error was found due to the exception articulated in *Evans*). Flower’s statement was not a written or recorded confession by Mr. Long, so that exception is inapplicable, so this exhibit should not have been furnished to the jury during deliberation.

The Western District's opinion in this case agreed that the typed-statement was testimonial in nature, but incorrectly found Mr. Long was not prejudiced by the trial court's action in sending the statement to the jury room, "as he made substantial use of the statement in his defense." *State v. Long*, No. WD61050, slip op. at 18-20, (Mo. App. W.D. 2003). The court's first conclusion that the typed statement was testimonial in nature is correct. E.g., *Royals v. State*, 65 S.E.2d 158 (Ga. 1951) (finding that a signed statement of an alleged co-conspirator was testimonial, therefore the trial court erred in permitting the jury to have it in the jury room during their deliberation). But the Western District's conclusion that there was no prejudice is incorrect.

Mr. Long did *not* make substantial use of the statement "in his defense." He did question Detective Cummings about some of what Ms. Flower said in the statement (Tr. 279-86), *after* the State had initially questioned her about the statement (Tr. 268, 271-73). But many of those matters had already been testified to by Ms. Flower at trial.

For instance, Mr. Long asked Detective Cummings whether Ms. Flower had mentioned that she was planning to watch cable television with her two alleged attackers and other people whom she had watched television with before (Tr. 179-80). But Ms. Flower had already testified to this (Tr. 146-47, 148, 183-85). Next, Ms. Flower testified that she was back-handed and hit so hard that she was knocked unconscious (Tr. 160, 188, 189, 194-95). Whereas Detective Cummings testified that in Ms. Flower's statement she did not use the word

“backhand;” Ms. Flower said that she was hit with a fist. This difference is insignificant (Tr. 281). In her statement Flower claimed she had scratched Mr. Long’s face and neck (Tr. 282); she gave the same testimony at trial (Tr. 185, 186). In her statement she said that Manning did not ejaculate in her mouth, Mr. Long did (Tr. 282); she testified that Mr. Long ejaculated in her mouth, but she could not tell whether Mr. Manning did (Tr. 161, 187-88). As to Mr. Long, there is no difference in the two statements. In her statement she said she had never met Mr. Long before (Tr. 283-84); this was consistent with her trial testimony (Tr. 151). In her statement she claimed that she watched a pornographic video involving boys (Tr. 284); she claimed the same during her testimony (Tr. 181). Finally, in her statement she claimed that Mr. Long had anal sex with her three times and ejaculated in her mouth and her “rectum” (Tr. 284-85). At trial, Ms. Flower testified that Mr. Long ejaculated in her mouth and her rectum (Tr. 187, 188), but testified that he had anal sex with her twice (Tr. 186). The difference is not of great significance. Thus, it cannot be said that Mr. Long “made substantial use of the statement in his defense,” as asserted by the Western District. **Long**, slip op. at 20.

But even if Mr. Long had “made substantial use of the statement in his defense,” that still would not preclude a finding of prejudice. As in *O’Neal*, *supra*, Mr. Long suffered prejudice because the State impermissibly obtained an unfair advantage when it was allowed to bolster Ms. Flower’s testimony and to emphasize her statement during the jury’s deliberation by allowing the jury to read

the statement over and over while Mr. Long's version was not present during deliberation.

Although there was some medical testimony to support that someone had done something to Ms. Flower, there was no medical evidence linking Mr. Long to those acts. When a search warrant was executed to search Mr. Long's apartment, there was no evidence recovered that showed that Ms. Flower was sexually assaulted there. Although Ms. Flower testified she scratched Mr. Long's neck and face, there was no evidence of scratches; in fact, a witness testified that he did not have any scratches (Tr. 388-89). Mr. Long did not confess, and there were no independent eyewitness to the alleged crimes.

Thus, it primarily was a swearing match: Ms. Flower claimed Mr. Long took part in the crimes; he denied it. To reach its verdict, the jury obviously weighed the testimony of Mr. Flower and Mr. Long. By allowing the statement to the jury during deliberation, the State obtained an unfair advantage in that weighing process. The typed-statement bolstered Flower's trial testimony; whereas Mr. Long's oral testimony could only be highlighted by jurors' recollections. By allowing the jury to take Ms. Flower's typed-statement, which directly implicated Mr. Long, into the jury room, there exists a reasonable probability that the jury gave more weight to Ms. Flower's version. If read and reread by the jury, the statement would have an unfair advantage over oral testimony of Mr. Long, by speaking to the jury more than once. *See, State v. Poe*, 458 S.E.2d 242 (N.C. App. 1995) (trial court committed plain error in allowing the

jury to take a witness' statement into the jury room over defendant's objection because there was a reasonable possibility and a reasonable assumption that the jury may have inadvertently given more weight to the statement). *In accord*, ***Thomason v. Genuine Parts Co.***, 275 S.E.2d 159 (Ga. App. 1980) (where witness admitted one inconsistent statement but refused to answer with respect to the other, the trial court committed reversible error in allowing pages of the transcript wherein this occurred to be submitted to the jury during deliberations because the statement was unduly emphasized as the jury had an opportunity to read them one or more times after hearing them read in the courtroom, whereas oral testimony from the stand was heard only once).

The State's improper enhancement of Ms. Flower's statement deprived Mr. Long of due process and a fair trial. This Court must reverse Mr. Long's convictions and remand for a new trial.

#### **IV.**

**The trial court abused its discretion in not disclosing to the defense the psychological, psychiatric, and medical records of Deborah Flower (Exhibits Nos. 47, 49, 50), because such ruling violated Mr. Long's rights to confront the witnesses against him, to due process and a fair trial, to compulsory process, and to present a defense, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this precluded Mr. Long from fully exploring Flower's credibility, bias, and her ability to discern reality on the day of the charged offense and during her testimony. Mr. Long was precluded from discovering possible evidence of false reports, of a history of psychiatric disorders manifesting themselves in manipulative and destructive conduct, of mental disorders having a high probative value on the issue of credibility, and of mental defects that materially affected the accuracy of Ms. Flower's testimony or tended to produce bias in her testimony. Further, there was a waiver of the privilege since the jury was informed by the state, including through Ms. Flower's testimony, that she was "mentally handicapped," had "a caseworker through Tri-County," received "disability income," and was taking several medications for her disability. (Point II in Western District)**

### ***A. Facts***

Prior to trial, Mr. Long subpoenaed medical and psychiatric records of Deborah Flower from Tri-County Mental Health Services (State's Exhibits Nos. 49, 50, which were filed under seal)<sup>18</sup> and also the Public Administrator's office in Clay County (State's Exhibit No. 47, which were returned to that office) (Tr. 8-11, 287-295, 484-485, 518-519). The trial court made an in-camera inspection of those records to determine their admissibility (Tr. 8-11, 287-95, 484-85, 518-19).

Mr. Long asked the trial court to look for: any record that Ms. Flower would drink alcohol with her medication; a history of her not remembering or hallucinating or coming up with stories that turn out to not be true; a history of her abusing her prescribed medications with a history of hallucinations or not being truthful; or, any fixation about rape or psychological problems regarding rape or untrue claims about rape (Tr. 292-94).

Regarding the Tri-County records, the trial court made available to the parties copies of "cumulative, and very short at that, statements as to what was said." (State's Exhibit No. 48) (Tr. 400-01).

However, the trial court noted that he had used "the same standards" that he had when making admissibility rulings on Mr. Long's other offers of proof, and thus there were matters in the records that Mr. Long might be offering into evidence (Tr. 401). The trial court commented,

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<sup>18</sup> Those records were so voluminous they had to be put in two envelopes.



If the rulings I've made on things that are before and before everybody don't stand up, if this case does result in a conviction and an appeal, and the Court of Appeals would say, Maloney [the trial judge] did it wrong in keeping out some of this evidence that you want in, you should ask that the material be reviewed again, and it should be reviewed again ahead of time before the next trial of case because if it's me, I would want, I'd have the guidance of the appellate court, and I might take a little different view of some of the things that are in there.

If my rulings hold up, nothing that's in that has anything to do with the issues in this case. I'm referring to Exhibits 49 and 50. Forty-eight will be part of the record only to demonstrate to any reviewing Court the sole part of the record, the only part of the record that was revealed after the in-camera inspection.

(Tr. 401-02).

Regarding the Public Administrator's file, the trial court ruled that there was no exculpatory information contained therein (Tr. 518).<sup>19</sup>

Mr. Long raised this issue in his motion for new trial (L.F. 33-34; claim 6).

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<sup>19</sup> Because the exhibit was the original file, it was returned to the Public Administrator (Tr. 518).

### ***B. Standard of Review***

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Newton*, 963 S.W.2d 295, 297 (Mo. App. E.D. 1997). The trial court's ruling on the admission or exclusion of evidence will be disturbed only if an abuse of discretion is shown. *Id.*

### ***C. Discussion***

“The fundamental purpose of a criminal trial is the *fair ascertainment of the truth.*” *State v. Carter*, 641 S.W.2d 54, 58 (Mo. banc 1982). The right to confront one's accusers is “an essential and fundamental” tool in ensuring this purpose is realized. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The Confrontation Clause ensures criminal defendants the opportunity to conduct *effective* cross-examination of adverse witnesses. *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987). A defendant may not be unduly restricted in his attempt to test the accuracy of an adverse witness' testimony. *State v. Moorehead*, 811 S.W.2d 425, 427 (Mo. App. E.D. 1991). Such a restriction is an abuse of the trial court's discretion. *Id.*

The Sixth Amendment's Compulsory Process Clause establishes, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

Although Missouri recognizes a physician-patient privilege, **Section 491.060**, Missouri courts have recognized that this privilege “may give way to

some extent where there is a *stronger countervailing societal interest*.” *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 230 (Mo. App. S.D. 1996). *Cf. State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992) (the duty for the State to disclose exculpatory evidence required the disclosure of the psychiatric record of the victim, *including previous false reports*).

The circumstances and interests in justice involved herein necessarily require Ms. Flower’s statutory privilege to yield to Mr. Long’s constitutional rights to confront her and to compulsory process. This is nearly identical to *Davis v. Alaska*, 415 U.S. 308, 319 (1974) where the United States Supreme Court concluded that Alaska’s legitimate interest in preserving the anonymity of its juvenile offenders had to give way to the defendant’s paramount right to probe into the influence of possible *bias* in the testimony of a *crucial identification witness*. *Id.*, 415 U.S. at 319. Similarly, Missouri’s interest in preserving the confidentiality of Ms. Flower’s records must yield to Mr. Long’s paramount right to the credibility of her very important testimony.

In *Moorehead*, the defendant sought to impeach the credibility of the complaining witness with her medical records, and the trial court allowed him to do so in a limited manner. 811 S.W.2d at 427. Moorehead made two references to the victim’s records, including reading an excerpt from her discharge summary from the Department of Mental Health. *Id.* These references informed the jury that the victim “was not always firmly planted in reality.” *Id.* Consequently, the Eastern District found no abuse of discretion. *Id.*

Mr. Long should have been permitted to confront Ms. Flower with her psychiatric records, after all, “[c]ertain forms of mental disorder have high probative value on the issue of credibility.” *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983). Indeed, many types of mental defects may materially affect the accuracy of testimony and mental illness may tend to produce bias in a witness’ testimony. *Id.*

In *Lindstrom*, 698 F.2d at 1165, the district court reviewed the pertinent psychiatric records, but denied Lindstrom access to them because “access to the confidential professional materials would violate the witness’ privacy right.” The Eleventh Circuit reviewed these records and concluded that the district court abused its discretion and contradicted United States Supreme Court authority “on the right of confrontation in general and the right to examine the psychiatric history of adverse witnesses in particular.” *Id.* at 1163. The records in *Lindstrom* “suggested a history of psychiatric disorder, manifesting themselves in violent threats and manipulative and destructive conduct having specific relevance to the facts at issue.” *Id.* The Court acknowledged the patient’s and society’s interest in keeping psychiatric records confidential, but held

[those interests] are not absolute and, in the context of this criminal trial, must “yield to the paramount right of the defense to *cross-examine effectively the witness in a criminal case.*”

*Id.* at 1167, citing, *United States v. Society of Independent Gasoline Marketers of America*, 624 F.2d 461, 469 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981).

Lindstrom was entitled to review the witness' psychiatric records and entitled to present such evidence to the jury so it could determine "whether the witness' testimony was based on historical facts . . . or whether it was the product of psychotic hallucinations." *Id.* at 1168.

In *Independent Gasoline*, the district court examined the records and notified counsel that the records indicated two periods of hospitalization. 624 F.2d at 467. The defense was then allowed to question the witness about these two periods of hospitalizations, one occurring before the incident and one occurring after it. *Id.* However, the court precluded the defense from examining the records. *Id.* The defense presented evidence at trial to contradict this witnesses testimony, but without the hospital records was severely limited in its ability to impeach him regarding his ability to properly perceive. *Id.* at 469. The Fourth Circuit concluded, "We can think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight." *Id.* The witness' interest in privacy must therefore yield to the defense's right to confrontation. *Id.* (cite omitted).

Here, the trial court abused its discretion. Ms. Flower's records may shed light on "whether the [her] testimony was based on historical facts ... or whether it was the product of psychotic hallucinations." See *United States v. Lindstrom*, 698 F.2d at 1168. There also may be evidence of false reports, of a history of

psychiatric disorder that manifest themselves in manipulative and destructive conduct, of mental disorders that have a high probative value on the issue of credibility, and of mental defects that materially affect the accuracy of testimony or tend to produce bias in a witness' testimony. Certainly, based upon the trial court's comments (Tr. 401-02) there was at least information similar to those raised in Points I, V, and VI of this brief. Mr. Long was entitled to review and then use these records either to cross-examine or impeach Ms. Flower.

Also, there was a waiver of the privilege in this case.

During *voir dire*, the State told the jury that Ms. Flower was “a mentally handicapped individual” and that she “has a caseworker through Tri-county” (Tr. 68). The State mentioned this again in opening statement, and noted that Ms. Flower received “disability income” (Tr. 121). Ms. Flower testified that she received disability, had a caseworker at “Tri-County,” and was on the following medications: Serzone, Neurontin, Klonopin, Trazedone and Pemarkin (Tr. 143-44). During argument, the State again referred to Ms. Flower's low level of intellectual functioning (Tr. 534, 538, 561). Once Ms. Flower testified about her mental disability, she could no longer assert the privilege as to her records. ***Brandt v. Medical Defense Associates***, 856 S.W.2d 667, 672 (Mo. banc 1993). *Also See*, ***State v. Evans***, 802 S.W.2d 507 (Mo. banc 1991) (Defendant's girlfriend waived physician-patient privilege with respect to medical records indicating she had been diagnosed as having and treated for gonorrhea shortly after defendant's alleged rape of nine-year-old cousin who tested positive for vaginal and rectal gonorrhea,

where girlfriend on direct examination by defense counsel testified that to the best of her knowledge she had not had gonorrhea or received any type of treatment for gonorrhea; girlfriend waived physician-patient privilege by placing her medical condition at issue through her testimony). *Brandt, supra*.

Further, the State attempted to use Ms. Flower's disability to gain sympathy from the jury, yet also sought to prevent Ms. Flower's from using information regarding that disability to show the jury how that mental disability affected her credibility and bias. Missouri courts have made it abidingly clear that a patient should not be allowed to use the privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence. In other words, the state could not use the privilege both as "a shield and a dagger" at one and the same time.

Therefore, this Court must reverse Mr. Long's convictions and remand for a new trial.

## V.

**The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, through the proffered testimonies of Timothy Wilson and Kevin Bonei that Ms. Flower engaged in sexually provocative actions when she was drinking alcohol, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, in that this excluded evidence was relevant because it would have supported Mr. Long's defense that Ms. Flower became intoxicated, engaged in some consensual sexual acts, and then, possibly due to the effect that the alcohol had on medications that she had been prescribed due to her mental illness, she became hysterical and misconstrued what was going on. (Point IV in Western District)**

### *A. Offers of Proof*

#### *(1) Kevin Bonei*

Kevin Bonei lived in the same trailer park as Ms. Flower and had known her for about a year (Tr. 337). Once, Ms. Flower convinced Mr. Bonei and his wife to take their clothes off to have sex with them (Tr. 338, 343-44). They got into some sexual positions while naked, though Mr. Bonei did not have sexual intercourse with her, but they stopped after about thirty minutes (Tr. 343-44). This happened after Ms. Flower was drinking (Tr. 338).



The trial court ruled that he would not allow evidence “of the occasion in which the victim took off her own clothes and got into bed with the other two people” (Tr. 349). Mr. Long raised the issue in his motion for new trial (L.F. 36-37; claim 10).

*(2) Timothy Wilson*

Timothy Wilson lived in the same trailer park as Ms. Flower (Tr. 353, 381). He had known her between three and three-and-a-half years (Tr. 353, 381). About a year-and-a-half to two years prior to trial,<sup>20</sup> Ms. Flower was in Mr. Wilson’s front yard screaming at Mr. Wilson’s wife that she wanted to have “sexual intercourse” with her (Tr. 361). A few hours later, Ms. Flower returned to the Wilson residence, she removed all but some underpants, and was screaming for Mr. Wilson to come outside as she was going to show him how she was going to “really make love to a man and how good she could be” (Tr. 362). Ms. Flower was intoxicated (Tr. 362).<sup>21</sup>

The trial court ruled that Mr. Wilson could not testify about Ms. Flower yelling at his residence (Tr. 364-68).

Mr. Long raised the issue in his motion for new trial (L.F. 40; claim 14).

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<sup>20</sup> This would mean that the alleged incident occurred around December of 1999 to June of 2000.

<sup>21</sup> It is significant to note, as shown in Point I, that Ms. Flower later made false allegations against Mr. Wilson.

### ***B. Standard of Review***

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). While this Court generally will not interfere with the trial court's ruling on the admission or exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.*

### ***C. Appellant was deprived of his right to present relevant evidence to the jury***

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citing, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)); *Olden v. Kentucky*, 488 U.S. 227 (1990). The denial of the opportunity to present relevant and competent evidence negating an essential element of the state's case may constitute denial of due process. *Ray*, 945 S.W.2d at 469. Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). If the defendant is deprived of the testimony of a defense witness, it may violate the defendant's rights under the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. *Id.*

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. *Ray*, 945 S.W.2d at 467. Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. *State v. Richardson*, 838 S.W.2d

122, 124 (Mo. App. E.D. 1992). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. *State v. Brown*, 549 S.W.2d 336, 340 (Mo. banc 1977).

Mr. Long acknowledges that under the rape shield statute, **Section 491.015**, generally evidence of specific instances of a complaining witness' prior sexual conduct is inadmissible. Notwithstanding the rape shield statute, when fundamental fairness is at stake, evidence of prior sexual conduct is admissible if introduction of such evidence is necessary to secure a defendant's right to present a defense. *State v. Douglas*, 797 S.W.2d 532, 534-536 (Mo. App. W.D. 1990). Missouri courts are not allowed to apply the rape shield statute so strictly as to deprive a defendant of the fair trial comprehended by due process:

The teaching of [*Davis v. Alaska*, 415 U.S. 208 (1974)] and [*Chambers v. Mississippi*, 410 U.S. 284 (1973)] is that a rule of evidence, whether it has its origin in statute, as in *Davis* and in the present case, or in common law, as in *Chambers*, may not be narrowly or mechanistically applied to deprive a defendant of rights to confront and cross-examine witnesses and to call witnesses in his own defense, both rights essential to due process and guaranteed by Fourteenth Amendment.

*Id.* at 535. Also see, *Olden*, *supra*, (Trial court's refusal to permit African-American defendant in kidnapping, rape and sodomy trial to cross-examine white complainant regarding her cohabitation with African-American boyfriend violated

defendant's Sixth Amendment right to confrontation of witnesses; such evidence was relevant to defendant's claim that he and complainant engaged in consensual sexual acts and that complainant, out of fear of jeopardizing her relationship with boyfriend, lied when she told boyfriend she had been raped).

Mr. Long testified at trial that Ms. Flower, who was taking several drugs for her mental problems, consumed a significant amount of alcohol before agreeing to engage in sexual acts with Mr. Long and Mr. Manning. Therefore, the proffered testimony was relevant to show that Ms. Flower acted consistently with Mr. Long's version of what had occurred on the day in question – sexual misconduct and hysterical actions following the consumption of alcohol. In addition, the incident involving Mr. Wilson was consistent with Mr. Long's defense that when Ms. Flower consumes alcohol, she exhibits a pattern of bizarre behavior. The proffered evidence should have been admitted.

“[T]he erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which ‘can only be overcome by a showing that such erroneous exclusion was harmless beyond a reasonable doubt.’” *State v. Bowlin*, 850 S.W.2d 116, 118 (Mo. App. S.D. 1993). This Court cannot declare the admission of this evidence harmless beyond a reasonable doubt.<sup>22</sup> Consequently, the trial court's rulings operated to deprive Mr. Long of his rights to present a

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<sup>22</sup> See discussion in Point I.

defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. Mr. Long is entitled to a new trial.

## VI.

**The trial court abused its discretion in precluding Mr. Long from presenting crucial evidence of his innocence, through the proffered testimonies of Leland Tucker, Kevin Bonei, Kristen Todtenhausen, Timothy Wilson, and appellant, that Ms. Flower had concocted a bizarre story of having broken the neck of someone who had attempted to rape her, in violation of Mr. Long's rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, in that this excluded evidence was relevant because it would have supported Mr. Long's defense that Ms. Flower would make up bizarre tales of sexual assaults. (Point V in Western District)**

### *A. Offers of Proof*

#### *(1) Leland Tucker*

Mr. Tucker testified that once Ms. Flower told him that she had put an ad in the paper for a date, and a man answered that ad and took her to his home in Kansas (Tr. 332). Ms. Flower said this man attempted to rape her and she “supposedly broke his neck” (Tr. 332-33). The trial court ruled that this proffered testimony was not admissible (Tr. 336).

#### *(2) Kristen Todtenhausen*

Kristen Todtenhausen testified that when they first met, Ms. Flower told Ms. Todtenhausen that she had met a man over the internet, had gone out on a date with him, he took her home and tried to rape her, and she broke his neck in “did

time in Wyandotte County for it” (Tr. 395). The trial court ruled that this evidence was inadmissible (Tr. 397-98).

*(3) Mr. Long*

Mr. Long testified that when Ms. Flower was at his apartment on the day in question, she told him a story about a prior attempted rape (Tr. 479). She told him that she had met a guy through a dating service (Tr. 479). When she was out on a date with that guy, he attempted to rape her (Tr. 479). She broke his neck and was charged with murder in Wyandotte County (Tr. 479-80). Ms. Flower claimed this other guy had both a male penis and a woman’s vagina (Tr. 479). The trial court sustained the state’s objection to this offer of proof (Tr. 481-82).

*(4) Kevin Bonei*

Kevin Bonei related that Ms. Flower had told her a story of someone trying to rape her (Tr. 340). She related that she had hurt someone’s neck after he attempted to take her clothes off and that she had to go to court for the incident (Tr. 340). The trial court ruled that this evidence was inadmissible (Tr. 342).

*(5) Timothy Wilson*

Timothy Wilson testified Ms. Flower told him that she had gone on a date with someone and that when they tried to “do something wrong to her”, she either broke their neck or cut their neck (Tr. 356-57). The trial court ruled that Mr. Wilson could not testify about the alleged “neck injury” incident (Tr. 364-68).

Mr. Long raised these issues in his motion for new trial (L.F. 32-33, 39-40; claims 5, 13).

### ***B. Standard of Review***

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). While this Court generally will not interfere with the trial court's ruling on the admission or exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.*

### ***C. Appellant was deprived of his right to present relevant evidence to the jury***

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citing, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)); *Olden v. Kentucky*, 488 U.S. 227 (1990). The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case may constitute denial of due process. *Ray*, 945 S.W.2d at 469. Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). If the defendant is deprived of the testimony of a defense witness, it may violate the defendant's rights under the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. *Id.*

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. *Ray*, 945 S.W.2d at 467. Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. *State v. Richardson*, 838 S.W.2d



122, 124 (Mo. App. E.D. 1992). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. *State v. Brown*, 549 S.W.2d 336, 340 (Mo. banc 1977).

Here, the excluded evidence was important since it supported Mr. Long's defense that Ms. Flower would make up bizarre tales of sexual assaults.

Mr. Long acknowledges that under the rape shield statute, **Section 491.015**, generally evidence of specific instances of a complaining witness' prior sexual conduct is inadmissible. However, it was not Mr. Long's purpose to show that the Ms. Flower had engaged in the prior sexual activity; instead, Mr. Long intended to show that the bizarre rape attempt had not occurred and was fabricated. *See, State v. Scott*, 78 S.W.3d 806, 810 (Mo. App. S.D. 2002) (rape shield statute does not preclude introduction of evidence of prior allegations by an alleged victim of sexual abuse if that evidence is offered to impeach the credibility of the victim as a witness; evidence of a victim's prior complaints does not fall within the ambit of the rape shield statute). *Also see, Brown v. Commonwealth*, 510 S.E.2d 751 (Va. App. 1999) (evidence of witness' prior testimony in an unrelated rape prosecution, when offered to show its substantial similarity for the purpose of testing the credibility of the witness, did not fall within the rape shield law).

“[T]he erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which ‘can only be overcome by a showing that such erroneous exclusion was harmless beyond a reasonable doubt.’” *State v. Bowlin*,

850 S.W.2d 116, 118 (Mo. App. S.D. 1993). The exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). The facts and circumstances of this case do not overcome this presumption.<sup>23</sup> This Court cannot declare the admission of this evidence harmless beyond a reasonable doubt. Consequently, the trial court's rulings operated to deprive Mr. Long of his rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. Mr. Long is entitled to a new trial.

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<sup>23</sup> See discussion in Point I.

## **CONCLUSION**

For the reasons presented in Point II, this Court should reverse Mr. Long's conviction for forcible rape under Count I and order Mr. Long discharged as to that count; For the reasons presented in Points I and III-VI, this Court should reverse Mr. Long's convictions and remand for a new trial.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 16,862 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on January 7, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this \_\_\_\_ day of January, 2004, to Richard Starnes, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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